Nos. 82-1186, 82-1465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—against—

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Respondents.

FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, and McGREGOR, SWIRE AIR SERVICES LIMITED,

Petitioners,

—against—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FRANKLIN MINT CORPORATION, FRANKLIN MINT LIMITED, AND McGREGOR, SWIRE AIR SERVICES LIMITED

Respondents in No. 82-1186 and Petitioners in No. 82-1465

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Questions Presented

1. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?

2. Whether a treaty provision should be enforced notwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

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Preliminary Statement

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited (collectively "Franklin

Mint")[1], respondents in No. 82-1186 and petitioners in No. 82-1465, respectfully submit this brief on the merits in these consolidated cases.

Statement of the Case

This action arises out of the loss by Trans World Airlines, Inc. ("TWA") of four packages of numismatic materials with a value of $250,000. Before the district court TWA conceded its liability under the Warsaw Convention[2] for the loss of this property (JA15).[3] Consequently, the only matter in dispute in this action is the extent to which TWA can limit its liability under Article 22[4] of the Convention. In considering this question, the Court must take into account the historical changes that have occurred in three areas since the Warsaw Convention was opened for signature in October 1929.

A. The End of the Official Price of Gold[5]

Following the cataclysm of World War I, the major currencies

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[1]Franklin Mint's amended designation of corporate relationships pursuant to Rule 28.1 is stated in the Appendix to this brief at page A3.

[2]Formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

[3]References in the form "JA _____" are to the Joint Appendix.

[4]Article 22 is reprinted in full at page A1 of the Appendix to this Brief.

[5]For brief descriptions of the economic history relevant to this action, see P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 79-91 (1974); T. Asser, "Golden Limitations of Liability in International Transport Conventions and the Currency Crisis," 5 J. Mar. L. & Com. 645, 650-52 (1973-74); P. Kennedy, Memorandum, Policy Development Division, Bureau of Consumer Protection, Civil Aeronautics Board (Mar. 18, 1980) ("Kennedy Memorandum") (JA42); Senate Comm. on Foreign Relations, Bretton Woods Agreements Act, S. Rep. No. 94-1148, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5935. See also L. Yeager, *International Monetary Relations: Theory, History, and Policy* (2d ed. 1976).

of the West (with the exception of the Spanish peseta) attempted, with varying degrees of success, to cope with the post-War inflation by a return to the international monetary system prevalent before 1919. This system, often called the gold standard, meant that a particular currency was, at least in theory, freely convertible into an established quantity of gold. The rationale for the gold standard is that it is a means of controlling inflation by linking the money supply to an independent standard of value. In France, for example, the fiscally conservative Raymond Poincare was elected as Premier in 1926; and in June 1928 he stabilized the franc by returning France to the gold standard.

The United States had never gone off the gold standard, however, and the gold content of the dollar was set by statute at 25.8 grains of gold. Gold Standard Act of 1900, ch. 41, §1, 31 Stat. 45 (1900). This provision was still in effect at the time of the final negotiations of the Convention in 1929, and hence the official price of gold then was $20.67 per troy ounce.

Following the Great Depression, many nations went off the gold standard and allowed their currencies to float. England did so in 1931, for example, and France followed suit in 1936. Although the United States remained on the gold standard, certain changes were made. For example, private ownership of gold was prohibited; and the redemption of dollars into gold was restricted to dollars held by foreign central banks and licensed private users.

More importantly, however, on 31 January 1934 the U.S. Gold Reserve Act devalued the dollar about 60% by reducing the legal equivalent of each dollar to 155/21 grains of gold. Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934), pursuant to the U.S. Gold Reserve Act of 1934, 48 Stat. 337 (1934). In other words, the price of gold was increased from $20.67 to $35.00 per troy ounce.

During the 1930's the existing monetary system was recognized as clearly inadequate and as a major causal factor of the international depression. Furthermore, the damage to the various national economies (except that of the United States) caused by World War II helped create a consensus that the free world's monetary system had to be different in the post-War world.

The outcome of this consensus was the conference at Bretton Woods, New Hampshire, in July 1944. One result of this conference was the creation of the organization known as the International Monetary Fund ("IMF"). In order to restore currency-exchange stability, and thereby restore world trade, the Bretton Woods Conference also made the decision to change the international monetary system into a "gold exchange" standard.

Under Article IV of the Articles of Agreement, each member was required to nominate a par value for its currency in terms of either gold or the U.S. Dollar that was in effect on 1 July 1944. The member was also required to maintain its rate within 1% of this par value. The Articles of Agreement also guaranteed the conversion into gold of major currencies and required members to purchase its currency from other members in gold or in the other nation's currency. The IMF was also provided with credit facilities to stabilize the currencies of countries having balance of trade difficulties.

The participation of the United States in the IMF was formalized with the enactment of enabling legislation. Bretton Woods Agreements Act of 1945, Pub. L. No. 79-171, 59 Stat. 512 (1945). The par value of the U.S. Dollar was set at one thirty-fifth of a fine troy ounce of gold, *i.e.*, $35.00 per troy ounce.

As a result, under the gold exchange standard the currencies of the free world were in practice linked to the dollar, while the dollar was based on gold. This role of the dollar as the linchpin of the system was a simple recognition of the facts that the

United States was the predominant economic force in the world and, in addition, possessed as reserves most of the world's gold supply.

During the 1960's this monetary system came under increasing pressure. For one thing, the huge superiority and strength of the United States relative to the rest of the world declined following the reconstruction of Europe and Japan. Inflation generated by the expenditures of the Vietnam War further accelerated the flow of dollars abroad. In addition, the need of the international system for dollars had grown to the point where the United States simply could not supply the dollars without weakening its own internal economy. As a consequence, the U.S. commitment to redeem dollars for gold became a physical impossibility.

As part of an attempt to remove the dollar from the center of the monetary system, the IMF adopted in August 1969 the use of an artificial unit of account called the Special Drawing Right ("SDR"). This accounting tool, originally defined as .888671 grams of fine gold, was established as a new form of reserve asset to be used by member nations among themselves as a supplement to the use of gold and dollars.

In 1966 France pulled out of the so-called Gold Pool, an arrangement created in 1961 by the central banks of various nations to maintain the official price of gold within certain margins. As a result of France's action and the continuing deterioration of the U.S. economic position, the central bankers could no longer maintain the official price of gold at $35/oz. The consequence was that in March 1968 a "two-tier" system arose. The various national governments would use among themselves one price of gold, the official price of $35, while private banks and individuals would buy and sell gold on the free market.

The change to a two-tier system was inadequate to stay the pressure on the dollar, however; and in August 1971 President

Nixon cut the link between gold and the dollar. While there was still an official price of gold, dollars could not be presented by foreign governments to the U.S. Treasury for conversion into gold. This elimination of the link between gold and the dollar in effect destroyed the monetary structure established at Bretton Woods.

Later that year, in December 1971, as part of the Smithsonian Agreement, the United States agreed to devalue the dollar. The official price of gold was consequently increased from $35 to $38 per ounce. The Agreement also provided for a system of central rates of exchange which would be more flexible (a margin of 2¼ % on both sides of the central rate) than the system of par values established under the original Articles of Agreement of the IMF.

Devaluation of the dollar was formally accomplished by passage of the Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972),[6] on 31 March 1972.

This Congressional action was necessary because the Bretton Woods Agreements Act of 1945 prohibited any change in the par value of the dollar without prior Congressional approval. See 22 U.S.C.A. § 286c.

With continuing balance of payments deficits, however, the 1971 devaluation of the dollar proved to be only a temporary palliative. In 1973 the dollar was again devalued, this time by 10%. The official price of gold rose from $38 to $42.22 per ounce. This devaluation was accomplished by Congress amending the Par Value Modification Act. Act of September 21, 1973, Pub. L. No. 93-110, 87 Stat. 352 (1973).

Nevertheless, the 1973 devaluation of the dollar was also unable to save matters. By March 1973 all of the major trad-

[6]The text of the pertinent portion of the Act, as amended, is included in the Appendix to this Brief at page A2.

ing nations, with few exceptions, were already floating their currencies and allowing world exchange markets to set currency values. This de facto floating of currencies clearly violated the Bretton Woods Agreement. Realizing that the system of fixed exchange rates was no longer being complied with by its members, the IMF began efforts to shape a new monetary system.

In the Jamaica Accords of 1975, it was agreed by the member nations of the IMF to eliminate gold as the basis of the international monetary system. In the IMF this change was reflected in the Second Amendment to the Articles of Agreement. Effective 1 April 1978 the SDR was to be the sole reserve asset to be used by the member nations of the IMF in their official dealings with each other. Because the currencies of the member nations would float against one another in accordance with market forces, the maintenance of a par value of each currency in terms of gold was unnecessary and was, in fact, prohibited by amendment to the IMF's Articles of Agreement.

In the United States the change was made by the Bretton Woods Agreement Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976). The result of this statute was to completely eliminate the definition of the dollar in terms of gold as of 1 April 1978. In short, as of that date, there is no longer in the United States an "official" price of gold. Since April 1978 the currencies of the free world, including the U.S. dollar, have floated against one another to achieve a price set by the market. The value of gold has likewise floated against the currencies of the world in accordance with market forces.

From the proclamation of the Warsaw Convention by President Roosevelt in 1934 until 1 April 1978, Article 22 posed no difficulty in the United States. As there was always a price of gold set by statute during this period, the gold unit in Article 22 was easily converted into dollars. This official price of gold no longer exists, although there is still a price of gold which can be used by the Court, the free-market price.

B. The Development of the Airline Industry

The second area of historical change which is important to the present dispute is the development of the airline industry. What was a new industry at the time of the Warsaw Convention negotiations has since developed into a mature sector of the international economy.

In 1929 international air transportation was still largely the province of adventurers. Lindbergh crossed the Atlantic in 1927, and Earhart did so in 1928. As stated in an internal CAB memorandum, "Furthermore, the delegates [to the Warsaw Conference] had little sympathy for anyone foolish enough to board an airplane without enough personal insurance to provide for his widow (or her widower) and children should the plane crash." (Kennedy Memorandum, *supra* at note 5; JA49-50; footnote omitted.)

Professor Lowenfeld has described the period in the following terms:

> The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles. The most advanced and popular United States aircraft, the Lockheed Vega, which carried six passengers and a pilot, had a cruising speed of about 120 miles per hour and a range of about 550 miles. Though the airplane had been invented at roughly the same time as the automobile, its coming of age as a common means of transportation lagged at least a generation or more behind. (A. Lowenfeld, *Aviation Law* §2.1 at 7-26 (2d ed. 1981).) ("Lowenfeld")[7]

[7]"The Convention was concluded in 1929—a time when commercial air transport was relatively primitive, and international commercial aviation even more so." Aeronautics Committee of the Association of the Bar of the City of New York, Report on the Rio Proposals To Amend the Warsaw Convention As They Affect Passengers' Personal Injuries and Death Claims, 22 J. Air L. & Com. 358, 359 (1955).

The Reporter to the Warsaw Convention, Henri de Vos, pointed out in his introductory remarks that in Belgium "on one single aerodrome in the summer season, there are up to 36 departures of regular lines by day." R. Horner and D. Legrez, *Second International Conference on Private Aeronautical Law, Minutes, Warsaw, October 4-12, 1929*, 23 (1975) ("Minutes"). As the result of developments, there was "the possibility that tomorrow, in all countries, facilities will be set up for both day and night flights!" *Id.* The conclusion to be drawn was that "What the engineers are doing for machines, we, lawyers, must do the same for the law." *Id.*

The tenuous position of the airline industry was reflected in the drafting of the Warsaw Convention. Low liability limits were intentionally specified as an inducement to the growth of the new industry.

> But it was expected that such a [liability] limit [of 125,000 gold francs], applied uniformly on international flights—and, it was hoped, internally as well through corresponding legislation in the member countries—would enable airlines to attract capital that might otherwise be scared away by the fear of a single catastrophic accident. (A. Lowenfeld and A. Mendelsohn, "The United States and the Warsaw Convention," 80 Harv. L. Rev. 497, 499 (1967); footnote omitted.)

This policy was also recognized when the Convention was submitted in 1934 to the U.S. Senate for ratification. As Secretary of State Hull said in his report to the Senate:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equi-

> table basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travellers and shippers in the way of reduced transportation charges. (Report of Secretary of State Cordell Hull, March 31, 1934, [1934] U.S. Av. Rep. 239, 242.)

In 1983, however, the situation is quite a different matter. As stated in the *amicus* brief of the International Air Transport Association, "The International Air Transport Association (IATA) is an organization of 123 international air carriers, many of whom either represent or are more than 50% owned by foreign sovereign nations that are parties to the Warsaw Convention." (IATA Brief on the merits at 2.) Even for those airlines not owned by a foreign government, the situation has changed radically since 1929:

> By the late 1950's, the argument originally stressed by the supporters of Warsaw—that the Convention was needed to attract capital to an infant industry—looked very much out of place. Though the profitability of the aviation industry had varied from year to year and country to country, its growth by any measure—capital, number of employees, gross revenue, equipment, passengers carried, shareholders—had been spectacular, especially since World War II. On the other hand, the accident rate was low and getting lower. Airlines were able to insure against liability to passengers, and while the rates varied, the cost of insurance in terms of overall costs was not a crushing burden. No potential investor or banker, it would seem, would make his investment or loan decisions turn on the limit of liability for accidents to passengers in international flight. The proof, if proof were needed, was that aviation had grown fastest in the United States, without benefit of a liability limit in three quarters of the states. The argument, accordingly, shifted toward protection of plaintiffs. (Lowenfeld, *supra*, § 4.31 at 7-105; footnotes omitted.)

Furthermore, according to Professor Lowenfeld, the shifts in tort law and in choice of law rules have made the claimed benefits of the Convention to plaintiffs no longer what they once were in the early 1930's. Lowenfeld, *supra*, at §§ 4.32, 4.33. This point was made in 1970 by a noted aviation defense lawyer:

> The advantages of the liability system created by the combined effects of Articles 17 and 20 were undoubtedly significant in the 1930's and even in the 1940's. However, circumstances have changed. Investigation of the causes of accidents has reached a very advanced stage and it is rare today that the probable cause of an accident cannot be determined as a result of the combined efforts of the governments concerned, the air carrier and the manufacturer. Additionally, there has developed in the 1950's and 1960's in the United States a very formidable array of attorneys who have acquired unparalleled ability in digging into the facts of an accident with a view to determining the cause for civil litigation purposes.
>
> Finally, the doctrine of *res ipsa loquitor* is now applicable generally throughout the United States to aviation accident litigation. (G. Tompkins, "Limitation of Liability by Treaty and Statute," 36 J. Air L. & Com. 421, 431 (1970); footnote omitted.)

As a consequence of the changed position of the international airline industry, Franklin Mint contends that one of the original policies of the Warsaw Convention is no longer applicable, namely, the desire to give protection to an infant industry. This view was adopted in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) in which the Civil Aeronautics Board was required as a policy guideline to consider as a factor for interstate and overseas air transportation, "[t]he placement of maximum reliance on competitive market forces and on actual and potential competition".

In the context of the Warsaw Convention, this change in the

basic nature of the industry was emphasized in the opening statement by the U.S. delegation to the Montreal Conference of 1966:

> But the overriding issue in the Warsaw Convention, as we see it, is that it was entered into in the late 1920's, when international aviation was hardly over the experimental stage and when the primary need was a means to prevent the growth of international aviation from being choked off by one or more catastrophic accidents. Today, in contrast, international aviation is big business. We are over the experimental stage. We are over the infant industry stage. Equally important, the techniques, equipment, and experience of our current international air transportation are such that the hazards of flying have been very much reduced and are actuarially predictable.
>
> For these reasons the United States believes that there is no longer justification for a Convention which tips the balance heavily in favor of the industry and against the consumer. (*Quoted in* Lowenfeld, *supra*, § 5.31 at 7-131.)

This statement is still true, and the Court should consequently give predominance to a Convention policy that is still valid: the granting of equitable awards based on a unit of account reflecting real value. See, *e.g.*, P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 94-95 (1974).

C. From the Warsaw Convention to the Montreal Protocols

The final area of significant change consists of the various amendments to the Warsaw Convention since it was first promulgated in 1929.

The Convention was seen as the beginning of an on-going process to codify international air law. As a vice-president of the Warsaw Conference stated

> Therefore, we should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make a first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on. (Minutes, *supra*, at 32.)

As mentioned above, the Warsaw Convention provided low limits of recovery as an aid to a new infant industry. Following World War II, this situation no longer seemed proper to many, and criticism of the limits in the Convention was expressed. See, *e.g.*, C. Rhyne, "International Law and Air Transportation," 47 Mich L. Rev. 41, 54-61 (1948). As a result, there were conferences concerned with revision of the Warsaw Convention in 1946 (Cairo), 1948 (Lisbon), 1949 (Montreal), 1952 (Paris), and 1953 (Rio de Janeiro).

Popular dissatisfaction with the limits, particularly as to personal injuries, was heightened as a result of the publicity surrounding entertainer Jane Froman, who was seriously injured in a plane crash in 1943. In her suit against Pan Am, her recovery was limited to $8,291.87. *Ross* v. *Pan American Airways*, 299 N.Y. 88, 85 N.E. 2d 880 (1949), *cert. denied sub nom.*, *Froman* v. *Pan American Airways*, 349 U.S. 947 (1955). The outcome of this dissatisfaction was the Hague Conference of 1955, in which the United States took the lead.[8] The resultant Hague Protocol of 1955 doubled the limits for liability in case of personal injury to $16,600. Although the United States signed this protocol, it was never ratified by the Senate.

In November 1965 the United States stated its intention to withdraw from the Convention at the end of six months pursuant to Art. 39 of the Convention. The reason given for this action was the low level of liability for personal injury. U.S.

[8]The leading article on the revisions to the Convention up to the Montreal Agreement of 1966 is A. Lowenfeld and A. Mendelsohn, "The United States and the Warsaw Convention," 80 Harv. L. Rev. 497 (1967).

Dep't. of State, Press Release No. 268, 53 Dep't. of State Bull. 923 (1965).

A hurried conference resulted, which produced the Montreal Agreement of 1966. This Agreement is not a treaty, but is instead a private agreement[9] subscribed to by the world's major airlines. In the Agreement the airlines agreed to (1) raise the limit for personal injury to $75,000.00, and (2) waive certain defenses under the Warsaw Convention. The United States withdrew its denunciation and thereby remained a party to the Convention. U.S. Dep't. of State, Press Releases Nos. 110-11, 54 Dep't. State Bull. 955 (1966).

In 1971 another meeting was held to consider revisions to the Warsaw Convention.[10] The resulting Guatemala City Protocol[11] raised the limit for personal injury liability from the 125,000 gold francs in the Convention to 1.5 million gold francs. The United States signed this protocol, although the Senate has never ratified it.

The last amendment of note is the set of protocols signed at the Diplomatic Conference on Air Law in Montreal in September 1975.[12] The relevant change for present purposes is that

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[9]Antitrust immunity was given in C.A.B. Order No. E-23,680, 31 Fed. Reg. 7302 (1966).

[10]The background and proceedings of this conference are described in R. Mankiewicz, "The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention," 38 J. Air L. & Com. 519 (1972).

[11]Guatemala City Protocol, *done* Mar. 8, 1971, *reprinted in Lowenfeld, supra,* Documents Supplement at 975.

[12]Montreal Protocols Nos. 3 & 4, *done* September 25, 1975, *reprinted in Lowenfeld, supra,* Documents Supplement at 985. These protocols are discussed in G. FitzGerald, "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Com. 273 (1976). See also D. Sheinfeld, "From Warsaw to Tenerife: A Chronological Analysis of the Liability Limitations Imposed Pursuant to the Warsaw Convention," 45 J. Air L. & Com. 653 (1980).

the SDR was substituted for the gold franc as the unit used in expressing limits of liability in the Warsaw Convention and its progeny. According to one participant at the conference, however, the measure was adopted without an "in-depth discussion of the implications . . . ."[13]

The Montreal Protocols were signed by the United States, and President Ford sent them to the Senate in January 1977. 123 Cong. Rec. 1148 (1977). On 8 March 1983 the Protocols came up for a vote and were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Although the Protocols still remain on the Senate calendar because of Senator Baker's request for reconsideration, it has been suggested that "the current thinking is that renegotiation of the limitation will probably precede any such vote." C. Dubuc and L. Doctor, "Legislative Developments Affecting the Aviation Industry," 48 J. Air L. & Com. 263, 264 (1983).[14]

The above brief history is relevant for two reasons. First of all, the various amendments concerning liability limits have not been uniformly adopted by the different nations. Thus, for example, Great Britain adheres to the Hague Protocol, but the United States does not. In addition, some countries have internal legislation affecting the calculation of the Warsaw Convention limits.[15] The result is that an international uniform limit of liability is impossible in the present world because not all nations are following the same text.

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[13]A. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?", Lloyd's Mar. & Com. L.Q. 169, 173 (1979 Part Two).

[14]Mr. Dubuc is former counsel of record for *amicus* IATA.

[15]*See, e.g.*, Italian Law No. 84 of March 26, 1983, 90 Gazetta Ufficiale della Republica Italiana (April 1, 1983) (reprinted in TWA's Brief on the Merits at BA37); Canadian Currency and Exchange Act: Carriage by Air Act Gold Franc Conversion Regulations, January 13, 1983, 117

(Footnote continued on following page)

Secondly, as this history shows, since the end of World War II there has been a concern with the low level of liability stated in the Warsaw Convention of 1929. It has been the consistent policy of the United States Government in this period to seek to raise these limits to more realistic levels. Although the focus of the various conferences has been on personal injuries, similar considerations are applicable to cargo as well. Consequently, in furtherance of this policy, the Court should seek to expand the rights of those who suffer damages because of the fault of international air carriers.

Summary of Argument

The carrier's limit of liability under the Warsaw Convention is expressed in gold francs. It is clear from the text of the treaty, the minutes of the drafting conference, the practice of this country for almost fifty years, several foreign legal decisions, and commentaries, that the gold franc must be converted into dollars using a gold value. The only existing price of gold, and hence the only one that can rationally be used for Article 22, is that set by the open market. Use of either of the proposals suggested by TWA means changing Article 22 from a gold clause to a currency clause. The so-called "last" official price of gold has not existed since 1978 and is therefore nothing more than a fiction. Use of the SDR means by-passing the Senate and amending the Convention on an issue presently before that body.

Alternatively, the Court can determine that Article 22, as presently written, is unenforceable. Article 22 of the 1929 Con-

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(Footnote continued from previous page)

Can. Gaz., pt. II, No. 2, at 431 (Jan. 26, 1983) (reprinted in TWA's Brief on the Merits at BA36); United Kingdom's Statutory Instrument 1980 No. 281 (JA70); South African Carriage by Air Act, No. 17 of 1946, §3(7), *as amended* by No. 5 of 1964 and No. 81 of 1979, Stat. S. Afr. (Issue No. 13) 15, *implemented by* Dep't. of Transport Notice R 2031 (Sept. 14, 1979) (reprinted in TWA's Brief on the Merits at BA39); Sweden's Carrier by Air Act (1957:297), ch. 9, §22 (*as amended* Mar. 30, 1978) (JA67).

vention was premised on the existence of a gold-dollar ratio set by government fiat. The international community abandoned this assumption in the Jamaica Accords of 1975, and domestically the Congress eliminated an official gold price by the repeal of the Par Value Modification Act. Although the Congress abandoned the assumption upon which Article 22 had been based, the legislature has failed to provide a new standard of recovery, such as the SDRs used in the Montreal Protocols of 1975. The conclusion that the Congress modified the Warsaw Convention by its repeal of the Par Value Modification Act is supported by established principles of domestic constitutional law.

If the Court determines that Article 22 is unenforceable, the Court should make this holding effective as of 1 April 1978, the date when Congress cut the official link between gold and the dollar. Giving retrospective effect to such a ruling comports with the Court's normal procedure and is further justified by the facts that (1) the airlines have known since the mid-1970's of the uncertainty surrounding Article 22, (2) retroactive effect is in furtherance of the rationale of the ruling, and (2) substantial inequity would result to Franklin Mint and similar claimants by a contrary decision.

ARGUMENT

POINT I

If enforceable, the Article 22 limit should be converted into dollars using the free-market price of gold.

Article 22[16] of the Warsaw Convention states in pertinent part:

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, . . .
>
> * * *

[16]Article 22 of the Convention is reprinted in full at page A1 of the Appendix to this Brief.

> (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

From 1934, when the United States adhered to the Convention, until 1978, the above treaty language posed no problem. In the United States during this period there was always a relationship between gold and the dollar which was fixed by law. Thus, for example, in 1934 the value of gold was set at $35.00 per troy ounce pursuant to statute. U.S. Gold Reserve Act of 1934, 48 Stat. 337 (1934); and Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934).

The problem arose in 1978 when the United States cut the statutory link between gold and the dollar. As mentioned above, this break was made in the United States as part of the international economic agreement called the Jamaica Accords of 1975. Pursuant to the Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the definition of the dollar in terms of gold was eliminated. As a result, since the effective date of the statute, April 1, 1978, there is no longer in the United States an "official" price of gold.

Because of this change in the statutory role of gold, the question has arisen as to the proper means of converting into dollars the gold franc specified in Article 22 of the Warsaw Convention. Franklin Mint submits that (1) if the Convention is interpreted as written and as intended, the reference value must be based on gold, and (2) the only gold price that can be used is that price currently in existence, the free-market price.

The starting point in the interpretation of a statute is the text. *Bowsher* v. *Merck & Co.*, 453 U.S. 111 (1983); *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). The same rule is applicable to treaties. *Sumitomo*

Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982); *Maximov* v. *United States*, 373 U.S. 49 (1963); Restatement, Second, of the Foreign Relations Law of the United States § 147 (1)(a), (2) (1962). In the present matter the Convention states[17] "65½ milligrams of gold at the standard of fineness of nine hundred thousandths." The reference to gold is unambiguous.

The Warsaw Convention was the result of a conference held in Poland in October 1929. In the draft version initially submitted, the limit of liability was expressed in French gold francs. See Minutes, *supra*, at 265. After debate the drafters specifically rejected a French proposal to change the text to refer to an undefined French franc.

The relevant minutes of the conference are reprinted in the Joint Appendix beginning at page JA158.

Of particular importance is the view of the Swiss delegate, whose views on this issue were adopted:

> Naturally, one can say "French franc" but the French franc, it's your national law which determines it, and one need have only a modification of the national law to overturn the essence of this provision. We must base ourselves on an international value, and we have taken the dollar. Let one take the gold French franc, it's all the same to me, *but let's take a gold value*. (Minutes, *supra*, at JA162; emphasis added.

The conclusion that the framers of the Convention intended a gold value is supported by earlier events of that year. In July 1929 the Permanent Court of International Justice decided *The*

[17]The sole official language of the Convention is French, Article 36, and it is this language that controls. *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). There has been no disagreement between the parties as to the English translation of Article 22 which is printed at 49 U.S.C. §1502 note (1970).

Serbian Loans Case, II Hudson, World Court Reports 344 (1935), *discussed in* V Hackworth, Digest of International Law 630 (1943). That decision involved the interpretation of various international loan agreements in which the payment was based on a gold franc.[18] As the gold franc decreased in gold content between World War I and 1929, the issue was as to the meaning of a gold franc.

The World Court said that "It is manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coins, but to gold as standard of value." *Id.* Furthermore, the World Court also found that "To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, as above stated." *Id.* Consequently, a few months later at the aeronautical conference in Poland, there was outstanding an important, recent decision by the World Court holding that the gold franc is a reference to a standard of value.

In interpreting a treaty the court is to give effect to the intentions of the contracting parties. *Rocca* v. *Thompson*, 223 U.S. 317, 331-32 (1912). The framers of the Warsaw Convention made in Article 22 (4) a specific decision to base the liability limit on a gold value, and this decision can best be honored by the Court by interpreting Article 22 by reference to the market price of gold.

This intent of the Convention's drafters was emphasized by the Argentinean court in *Florencia, Cia. Argentina de Seguros S.A.* v. *Vaig S.A.* (Federal Civil & Commercial Court, Buenos Aires, Argentina, August 27, 1976), *original text reprinted in* 1977 Uniform L. Rev. 198 (JA169):

> The Warsaw Convention does not expressly define the point; it appears to us proper to interpret it in the manner

[18]The franc used was the "germinal" franc, which had a different gold content than the Poincare franc.

> that the limit of liability established seeks to approximate as accurately as possible the true value of gold (see P.P. Heller, "The Warsaw Convention and the Two Tier Gold Market," cited by A. I. Mendelsohn.) This manner of looking at the problem appears particularly suitable if it is borne in mind that the international legislature desired to have reference to an ideal currency which is defined only by its metallic content, which, in view of its intrinsic character—gold—permanently retains its value. (JA 172.)

The commentator cited by the Argentinean court, Paul P. Heller, has discussed the use of the gold franc in various international conventions and has reached the following conclusion:

> From all these statements the following conclusions can be drawn:
>
> The states parties to the several international air and maritime law conventions adopted gold francs as the monetary system for establishing limits of carriers' liability in order to provide limits
>
> (i) which would be uniformly applicable, independent of currency fluctuations, within their jurisdiction, and
>
> (ii) which would protect against inflation by linking the limits to the real value of gold. (P. Heller, "The Value of the Gold Franc-A Different Point of View," 6 J. Mar. L. & Com. 73, 94-95 (1974).)

See also, A. Mendelsohn, "The Value of the Poincare Gold Franc in Limitation of Liability Conventions," 5 J. Mar. L. & Com. 125, 127 (1973-74).

Another factor supporting Franklin Mint's position that a flexible gold value must be used is the practice followed in this country.

During the period between the promulgation of the Convention and the United States' adherence to it, the price of gold

rose about 60% from $20.67 to $35.00 per troy ounce. The resulting increase in the liability limit was accepted by all as a matter of course, and there was never a suggestion that the liability limit was frozen at the 1929 level. When the official gold price rose twice during the 1970's, no one contended that the Convention prohibited an adjustment of the carrier's liability limit. The system had the capacity to change with the times.

In fact, this readjustment of the limit because of a change in the price of gold has been used by the airline industry as an argument against changing the Convention limit. For example, following World War II Mr. John Clare, the then-insurance manager of Pan American World Airways, opined that:

> . . . [P]owerful basic economic forces continuously, effectively and automatically are correcting the Warsaw Convention limit of passenger liability for changes in the gold value of the national currencies of the various adherent nations. This is a tribute to the farsightedness and excellent judgment of the original framers of this convention. (Clare, "Evaluation of Proposals to Increase the Warsaw Convention Limit of Passenger Liability," 16 J. Air L. & Com. 53 (1949).)

Mr. Clare traces the history of the Warsaw limits in Brazil, Mexico and France to illustrate, in the context of the floating-exchange rate system that existed in all countries (except the United States) prior to Bretton Woods, the automatic increases in the limits caused by the gold standard of the Warsaw limits. Mr. Clare concludes his comments on that history with the following observation:

> The recent increase of 42% in the limit of liability in terms of Mexican Pesos and the increase of 80% in the limit in terms of French Francs, which have been cited above, came about because of the fact that the limit of liability now contained in the Warsaw Convention is stated in terms of a commodity, namely, gold.

> The automatic way in which the Warsaw Convention limit of passenger liability, expressed in current monetary units, is corrected for changes in the value of money can more easily be understood if the limit of liability is considered as being the value of 236.9 troy ounces of fine gold. In this connection, it should be pointed out that in 1929, when the official U.S.A. gold price was $20.67 per fine ounce, the Warsaw Convention limit of passenger liability was $4,898 U.S. Currency. When the price of gold in the U.S.A. was raised to $35.00 per fine ounce in 1934, the Warsaw Convention limit of passenger liability automatically was increased to $8,292, U.S. Currency. Table I shows the increases which automatically have occurred in terms of various other currencies since 1929.
>
> It would be a serious mistake to define the limits of liability in terms of anything other than some unit of gold currency of a specified weight and fineness. If the present limit had been stated in 1929 as 125,000 current or paper Francs, the dollar equivalent today would be only $584 U.S. Currency at the current official rate of exchange. One could not ask for a better illustration of the great protection given to the public by defining the limit of passenger liability in terms of a gold currency unit. (*Id.* at 57.)

See also J. Parker, "The Adequacy of the Passenger Liability Limits of the Warsaw Convention of 1929," 14 J. Air L. & Com. 37, 39 (1947).

A few years later this same point was made by the director of claims for United States Aviation Underwriters, Inc.:

> In suggesting that the Warsaw limit should be increased, most people believe that there has been no increase since the Convention was signed in 1929. This is definitely untrue. The limitation has actually been materially increased. This is because the limit on damages is based on the gold standard and all nations, including the United States, have

> devalued their currency with respect to gold. For instance, the value of gold has gone up more in the United States than the cost of living, according to the U.S. Air Coordinating Committee's own Economic Division. Generally speaking, the local equivalent in currency of the limit provided by the Warsaw Convention will buy more in the U.S.A. and most other nations, according to information filed with the U.S. Air Coordinating Committee in 1953 than when the limit was originally fixed in Warsaw in 1929. (G. Orr, "The Rio Revision of the Warsaw Convention—Part II," 21 J. Air L. & Com. 174, 176 (1954); footnote omitted.)

In the Hague Protocol of 1955, the Poincare franc was kept as the unit of account for the limitation. The definition was expanded, however, to make it clear that a gold value was intended: "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment." The Hague Protocol of 1955, Art. XI, *done September* 28, 1955, 478 U.N.T.S. 371, *reprinted in* Lowenfeld, *supra*, at Doc. Supp. 955.

During the 1970's the official price of gold changed twice. In December 1971 the price went from $35 to $38, and in September 1973 the price rose to $42.22 per troy ounce. Following each change, the Civil Aeronautics Board required the air carriers to change their tariffs to reflect this change in the price of gold. C.A.B. Order No. 72-6-7, 59 C.A.B. Rep. 953 (1972); C.A.B. Order 74-1-16, 39 Fed. Reg. 1526 (1974).

Because of the Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), there is no longer a price of gold set by statute. There is, however, a price that is readily and easily available, the market price. Use of the free-market price of gold is supported by the text of the treaty, the practice in this country to use a gold value, and the intention

of the Convention's drafters to "protect against inflation by linking the limits to the real value of gold." (P. Heller, "The Value of the Gold Franc-A Different Point of View", 6 J. Mar. L. & Com. 73, 94 (1974).)

Other than the judges of the Second Circuit, the only circuit judge to express a view on the present problem is Judge Walter Ely, a Senior Judge of the Ninth Circuit. In *Boehringer Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 531 F. Supp. 344 (S.D. Tex. 1981), *appeal docketed*, No. 81-2519 (5th Cir. Dec. 30, 1981)[19] he decided this issue by holding that the free-market price of gold should be used:

> Allowing defendant to limit its liability under the Convention based on the now-abolished "official" gold price of $42.22 an ounce would perpetrate a legal fiction of the purest kind. The Court finds no justification in the language or history of the Warsaw Convention to justify such a holding in this case. (531 F. Supp. at 352; footnote omitted.)
>
> * * *
>
> In light of the historical analysis discussed above, the Court finds nothing in these considerations upon which to conclude that it should employ the fiction of an official U.S. price of gold in converting the limitation sums expressed in the Convention. The only proper basis for determining defendant's liability limitation, at least since 1978, is with reference to the freemarket price of gold. (531 F. Supp. at 353; footnote omitted.)

Many of the foreign decisions also support the conclusion that the free-market price of gold should be used. *Cosida S.p.A. di Assicurazioni e Riassicurazioni* v. *B.E.A.*, Milan Ct. of App., No. 2796/77 (June 9, 1981; Judgment No. 861); *Kuwait Air-*

[19]Following oral argument, the Fifth Circuit advised counsel that it will await the Supreme Court's decision in this case. Letters of 4 March and 20 June 1983 to counsel of Chief Deputy Clerk, Fifth Circuit.

ways Corporation v. *Sanghi*, Regular Appeal No. 54/77 (Court of the Principal Civil Judge, Civil Station Bangalore, India August 11, 1978); *Balkan Bulgarian Airlines* v. *Tammaro*, (Court of Milan, Italy October 25, 1976); *Florencia, Cia. Argentina de Seguros, S.A.* v. *Varig, S.A.*, (Federal Civil & Commercial Court, Buenos Aires, Argentina, August 27, 1976), original text reprinted in 1977 Uniform L. Rev. 198; *Zakoupolos* v. *Olympic Airways Corp.*, No. 256/74, (Court of Appeal, 3d Dep't, Athens, Greece, January 10, 1974).

In a 1980 article on the subject, Paul Heller[20] reached the following conclusion:

> Under these circumstances, if limitation of liability is to remain part of the legal framework applying to international carriage, I wonder whether the carrier and their insurers could not live and thrive with limitation expressed in terms of gold, to be converted into national currencies at the market value. (P. Heller, "Converting The Gold franc-A Reply from an Unconverted," 5 Air L. 33, 34 (1980).

See also A. Mendelsohn, "The Value of the Poincare Gold Franc in Limitation of Liability Conventions," 5 J. Mar. L. & Com. 125 (1973-74).

In a treatise published in 1981 on the Warsaw system, Dr. Rene H. Mankiewicz, who has had long experience in the Legal Bureau of the International Civil Aviation Organisation, reached the conclusion that "As the purpose of expressing the limits in gold francs was to maintain the purchasing power of the amounts in question, it is submitted that the conversion into national currency should be made at the exchange rate for gold

[20]As mentioned above, Mr. Heller has been cited by the Argentinean court in *Florencia, Cia Argentina de Seguros, S.A., supra.* He has also been cited by the Second Circuit concerning the Warsaw Convention. *See Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 37 n.17 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

on the open market; (citing authorities)." R. Mankiewicz, The Liability Regime of the International Air Carrier 114 (1981).

If there is any doubt as to the interpretation of Article 22, those doubts should be resolved in favor of Franklin Mint. Limitations of liability sought to be enforced by common carriers, whether based on law or contract, are in derogation of the common law, and thus must be strictly construed. *Herd & Co. v. Kratwill Machinery Corp.*, 359 U.S. 297, 304-305 (1959).

Not only does the Warsaw Convention preempt inconsistent provisions of local law, see *In re Aircrash at Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 (9th Cir. 1982), but the Convention also creates Franklin Mint's cause of action. See *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). Consequently, the principle stated by the Court in *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163 (1940) should be applied:

> Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.

See also *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933).

This principle has been utilized in a Warsaw Convention cargo case. *Dalton* v. *Delta Airlines, Inc.*, 570 F.2d 1244, 1246 (5th Cir. 1978).

As alternatives to the free-market price of gold, TWA argues for the use of either the last official price of gold or SDR's of the IMF.[21] The court should reject both methods.

First of all, TWA's suggestions violate the text of the treaty. As written, Article 22 refers to a gold value. Using either of

[21]TWA has abandoned a third proposal that was argued in the lower courts, *viz.*, use of the current French franc.

TWA's methods means changing Article 22(4) from a gold clause to a currency clause. With the last official gold price, the reference to a gold value would be eliminated because the limit essentially then becomes a specified, fixed dollar amount. Article 22(2) would, in effect, be

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of $20.00 per kilogram, . . .[22]

Article 22(4) would be eliminated from the Convention as superfluous.

Using SDR's would also mean amending Article 22 to eliminate the gold provisions. Article 22(2) would become

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 17 Special Drawing Rights per kilogram, . . .[23]

As the district court pointed out in *In re Air Crash Disaster at Warsaw, Poland, on March 14 1980*, 535 F. Supp. 833 (E.D.N.Y. 1982), *aff'd on other grounds*, 705 F.2d 85 (2d Cir. 1983), *petition for cert. docketed*, No. 83-5 (July 11, 1983) (the "Polish Case"):

> Nevertheless, it would be a mistake to conclude from the fact that gold no longer plays a role in the international monetary system that all references to gold in the Conven-

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[22]According to C.A.B. Order 74-1-16, use of the official price of §42.22, which was the last official price in the United States, results in a figure of $20.00 per kilogram (JA57).

[23]Seventeen SDR's per kilogram is the figure proposed by TWA in its calculations at page 35 n. 42 of its Brief. This is the same figure as used in Montreal Protocol No. 4, Art. VII, *done* Sept. 25, 1975, *reprinted in* Lowenfeld, *supra*, at Doc. Supp. 991.

> tion may be ignored in calculating the liability limitation and a new measure substituted, whether the current French franc or the SDR. The Warsaw Convention's damage clauses are, in fact, drafted in terms of gold, and they have not as yet been amended to strike that reference. Both the drafting and redrafting of treaties is the business of branches of this government other than the judiciary. Unless and until the damage clauses are redrafted—no matter how logical it may seem to base the calculations upon the French franc, the SDR or any other currency or unit of account—the judiciary does not have the authority to, as plaintiffs correctly state, "read Article 22(4) out of the Convention and *substitute* an *alternative* method of calculating the damage limit." (535 F. Supp. at 843; footnote omitted; emphasis in the original.)

Adopting either of TWA's proposals would effectively amend Article 22 to substitute a currency clause for the present gold provision.

Franklin Mint submits that such a radical alteration of the essence of Article 22 also violates the intentions of the Convention's drafters. The legislative history of the Convention shows that the framers rejected a proposal to replace the gold franc by an undefined French franc. The purpose of the gold clause was, in the words of one commentator on the Convention, "to avoid, as far as the limits are concerned, the effects of devaluations which would result from having the limits expressed in any local currency". H. Drion, *Limitations of Liabilities in International Air Law* 183 (1954).

Using the last official gold price of $42.22 means using a dollar figure that is forever fixed. Consequently, the value of the Article 22 limit will change not because of any alteration in the value of gold, but because of changes in the worth of the dollar. It is precisely this linking of a claimant's recovery to the fortunes of a currency that the Convention's drafters wished to avoid.

The SDR is no better in this regard, because the SDR is currently nothing more than the weighted average of five currencies.[24] If the framers rejected the use of one currency, why should adding another four make a difference?

Contrary to TWA's description of the SDR as a "Rosetta stone" (TWA Brief, p. 35), the fact is that use of the SDR represents a fundamental change in Article 22. This point is shown by the Montreal Protocols of 1975, which specifically amend the Warsaw Convention on this issue. In Montreal Protocol No. 4, which pertains to cargo, the reference to gold in Article 22 is replaced by a reference to SDRs. This change is only for those signatories belonging to the IMF. Nations adhering to the Convention, but not members of the IMF, such as Switzerland or Poland, could, if they wished, continue as before.[25]

President Ford submitted the Protocols to the Senate in January 1977, and the treaties were reported out of committee subject to a qualified approval. One of the several provisos attached to the committee's approval was that "the United States government shall continue actively to seek to negotiate higher limits on the liability of carriers than those

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[24]These currencies are the American dollar, the English pound, the German mark, the French franc, and the Japanese yen.

TWA emphasizes the desire of the Convention's framers for stability. Yet it is questionable whether such stability can be achieved by utilizing a device, such as the SDR, which is redefined every few years. During the period 1968-74, the SDR was calculated on the basis of gold. From 1974 to January 1978, the SDR was based on the weighted average of sixteen currencies. The identity of the sixteen currencies was not consistent during this period, nor were the weights assigned to the various currencies. Since January 1, 1978, the SDR has been the weighted average of five currencies. Gold, by contrast, has been a medium of exchange and a standard of value for a few thousand years.

[25]Use of the SDR is criticized in A. Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?" Lloyd's Mar. & Com. L. Q. 169 (1979 Part Two). This brief article is reprinted at page A272 of the Joint Appendix submitted to the Court of Appeals.

provided under these Protocols." Senate Executive Report 98-1, at page 8, Committee on Foreign Relations, U.S. Senate, 98th Cong., 1st Sess. (February 10, 1983.)

The Protocols came up for debate and vote on 8 March 1983. Senator Percy, a proponent of the Protocols, asserted that the Protocols were a means of resolving *Franklin Mint* and other cases that reflect "a growing frustration, and even rebellion, by the U.S. court system against the present [Warsaw] system." 129 Cong. Rec. S2277 (daily ed. March 8, 1983) (remarks of Sen. Percy). Nevertheless, the Protocols were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Apparently, it was the first time since 1960 that a treaty had been rejected by the Senate. "Air Liability Treaty Rejected by Senate," N.Y. Times, March 9, 1983, at D6, col. 5. The Protocols still remain on the Senate calendar, however, because of Senator Baker's request for reconsideration. 129 Cong. Rec. S2279 (daily ed. March 8, 1983).

Hence, there is presently pending before the Senate a treaty that would specifically amend the Warsaw Convention to make the change being requested now by TWA, *i.e.*, use of the SDR. Under the Constitution treaties are to be made by the executive "by and with the Advice and Consent of the Senate". U.S. Const., Art. II, §2. Adoption of TWA's proposal to use the SDR would result in a judicial intrusion into a policy area allocated by the Constitution to the other branches. The Court should not amend the Convention under the guise of interpretation, particularly when the same issue is already before the Senate.

TWA criticizes use of the free-market price of gold because this price is subject to fluctuations.[26] The difficulty with this criticism is that it likewise applies to SDR's. TWA fails to ex-

[26]During oral argument, the Second Circuit, by Judge Oakes, suggested that one way of ameliorating the day-to-day fluctuations in the market price of gold would be to take the average market price over an extended period.

plain the distinction between the acceptable (to TWA) fluctuations in the price of SDRs and the unacceptable gold price fluctuations.

The alternative is picking a conversion factor with absolutely no fluctuations, *i.e.*, $42.22. The difficulty with this approach is that it creates a rigidity not found in the system as drafted by the Convention's founders.

The key in the phrase "last official price of gold" is the word "last". TWA's preference is to have the valuation of gold fixed for the future according to the state of affairs on 31 March 1978. No matter what happens to the domestic or world economy, passengers and cargo will always be stuck with the figure of $42.22.[27] Such a proposal destroys the flexibility inherent in the Warsaw system and substitutes for it a qualitatively different arrangement.

This point was recognized by the district court in the Polish Case:

> To be sure, tying the operation of a dynamic clause of the Warsaw Convention, meant to deal with a changing global economy without the need for constant amendment, to the public policy of the United States, as expressed in its official price of gold at one moment in time, runs the risk

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[27]The effect of inflation is illustrated in the Kennedy Memorandum, *supra* at note 5, at 4 (JA48). In 1934 the limit for a hypothetical 44-pound suitcase was $330. In 1980 this limit (using the last official price of gold) would be $400. Yet in purchasing power terms the $330 in 1934 would be the equivalent of $1,920 in January 1980.

As shown in the Clare article, *supra*, prior to the par value system created by Bretton Woods, the limit of recovery would fluctuate (except in the United States) based on fluctuations in the local currency. There has been no suggestion that the airlines were unable to deal then with these fluctuations in the limit. Table I in the Clare article shows, for example, that in France over a twenty-year period the limit increased 1420.1% in terms of the local currency.

> under some circumstances of itself undermining the intention of the Convention's drafters. (Polish Case, 535 F. Supp. at 844.)

In support of the $42.22 figure, TWA relies on two CAB documents. The first item is CAB Order 74-1-16, 39 Fed. Reg. 1526 (1974) (JA54), and TWA cites several cases for the proposition that an agency order is entitled to a presumption of validity. While that legal proposition is obviously true as a general rule, Franklin contests its applicability in the present case.[28]

CAB Order 74-1-16 is based on a factual assumption that no longer is present: the existence of an official price of gold in the United States. With the elimination of an official gold price, the entire foundation upon which Order 74-1-16 is based has been destroyed. The Order, by its very terms, is no longer factually applicable to the current situation.

The CAB itself no longer considers Order 74-1-16 as stating existing policy. This conclusion is shown by three documents submitted to the lower courts. The first item is CAB Order 81-3-143, which is dated March 24, 1981.[29] In that Order the CAB was concerned with the passenger limitation of the Convention, which is 125,000 gold francs. At the conclusion of the Order, the Board states "We do not by our statements in this order express any views on the appropriate valuation of 125,000 francs as expressed in terms of gold." If the Board had still considered Order 74-1-16 to state existing policy, then there obviously would have been a reference to Order

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[28]An agency interpretation of a statute that violates the purpose of the statute is not entitled to be followed. *United States ex rel. Dancy* v. *Arnold*, 572 F.2d 107, 113 (3d Cir. 1978); *National Wildlife Federation* v. *Snow*, 561 F.2d 227, 238 (D.C. Cir. 1976). The same reasoning is applicable to treaties. See *Deutsche Lufthansa Aktiengesellschaft* v. *Civil Aeronautics Board*, 479 F.2d 912 (D.C. Cir. 1973).

[29]This Order is reprinted at page A121 of the Joint Appendix submitted to the Court of Appeals.

74-1-16. Instead, the Board expressly disclaimed any views on the valuation of the gold franc.

The two other CAB items that support Franklin Mint are letters reproduced at pages A362 and A369 of the Joint Appendix that was submitted to the Court of Appeals. In the first letter the chairman of the CAB stated in May 1981 that "The Board has not taken any position on the issue . . . ." In a letter of November 1981, the General Counsel of the Board opined that the interpretation of the Convention's liability limit was for the courts to determine. No mention was made of Order 74-1-16.

The other CAB document on which TWA relies is the Golden Memorandum (JA33). Although Mr. Golden recommends maintenance of the status quo, it is not because of any strong belief in the merits of this approach. As he says in the concluding paragraph of his memorandum:

> Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet the Departments of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. (JA41)

In fact, in the sentence immediately following the one quoted by TWA in its brief at page 29, Mr. Golden points out the drawback of continued use of the $42.22 figure: "Use of the last official rate of gold, however may at times prevent passengers from recovering the full extent of damages caused by carriers. Carriers may no longer need the protection of these low limits, given the maturation of the aviation industry since 1929." (JA40-41; footnote omitted.)

TWA also relies on two federal decisions rendered after the Second Circuit's judgment in *Franklin Mint*.[30] *Maschinenfabrik Kern, A.G.* v. *Northwest Airlines, Inc.*, 562 F. Supp. 233 (N.D. Ill. 1983); *Deere & Co.* v. *Deutsche Lufthansa A.G.*, No. 81 C 4726 (N.D. Ill. Dec. 30, 1982) (not officially reported; set forth at page A-61 of the Appendix to TWA's certiorari petition). Both cases are by federal judges in Chicago, and both defer to the CAB on the matter. Yet in neither case is there any discussion of the CAB material subsequent to Order 74-1-16, in particular the Board's statement in Order 81-3-143 quoted above. Because these decisions are a rubber-stamp approval of an obsolete agency order, they are not entitled to great consideration. See *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

The only other federal decision on this issue post-*Franklin Mint*, is *In re Aircrash at Kimpo International Airport, Korea on November 18, 1980*, 558 F. Supp. 72 (C.D. Cal. 1983), *interlocutory review denied*, No. 83-8051 (9th Cir May 10, 1983). That case adopts the Second Circuit's reasoning and applies it retrospectively, as suggested at Point III below.

Finally, TWA relies on a number of foreign decisions.[31] Both

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[30]TWA also cites *Electronic Memories & Magnetic Corp.* v. *The Flying Tiger Line, Inc.*, No. 784512 (Cal. Super. Ct., San Francisco Aug. 25, 1982) (set forth at page A-60 of the Appendix to TWA's certiorari petition), which pre-dates the Second Circuit's opinion. The opinion by a California Superior Court consists of four sentences, and the decision is presently on appeal.

[31]TWA has also referred to a 1974 resolution of the Legal Subcommittee of the International Civil Aviation Organization (JA58). That resolution, however, was passed at a time when the "two-tier" gold system was in effect. Hence it is not surprising that preference was given to the official, as opposed to the unofficial, gold price. Furthermore, as one commentator has observed, "Obviously, since the resolution received so few affirmative votes, it could not be relied upon to afford a solution for problems caused by the two-tier gold regime." G. FitzGerald, "The

(Footnote continued on following page)

sides have foreign decisions in their favor, and suffice it to say that there is no international uniformity on the subject. This lack of uniformity is the reason for the drafting of the Montreal Protocols. In addition, the views of an English solicitor are in order:

> There are dangers in relying upon decisions of foreign courts in an indiscriminate fashion. Quite apart from possible errors or imperfections in translation where a judgment is in a foreign language, the judgment may reflect legal ideas used in foreign legal systems and essential to the proper understanding of the judgment but alien to those of the reader in another jurisdiction. Furthermore, there are many foreign cases in which the full facts are not described and the law not properly argued. Often the relevant authorities are not cited. There is thus a great danger in treating one or two foreign cases as pointing to the existence of some vaguely constituted international body of case law. Furthermore, the reporting of relevant decisions varies enormously in quality and clarity from country to country as does the inclusion of cases in various digests and periodicals produced on an international basis. It must be emphasized, again and again, that there is no international body of case law in the field of aviation nor, indeed, in any other." (P. Martin, "The price of gold and the Warsaw Convention (III)", 6 Air L. 246 (1981).) ("Martin")

TWA sets forth, for example, two Austrian decisions in the Appendix to its brief on the merits. *Kislinger* v. *Austrian Air-*

(Footnote continued from previous page)

Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air," 42 J. Air L. & Com. 273, 324 (1976). As TWA conceded to the district court, "as a practical matter, the effect of the 1974 ICAO Resolution has been eclipsed as a result of the elimination of an official rate of gold, . . ." (TWA Memorandum of Law of 31 July 1981 in Support of Defendant's Motion, at p. 22.)

transport, No. 1 R 145/83 (Commercial Court of Appeals of Vienna, Austria, June 21, 1983) (at BA 12); *Rendezvous-Boutique-Parfumerie Friedrich and Albine Breitinger GmbH* v. *Austrian Airlines*, No. 14 R 11/83 (Court of Appeals of Linz, Austria June 17, 1983) (at BA22). In Austria, however, the legislature had already adopted the SDR into analogous transportation conventions. In the Dutch case cited by TWA, *State of the Netherlands* v. *Giants Shipping Corp.*, Rechtspraak van de Week 321 (May 30, 1981) (Supreme Court of The Netherlands May 1, 1981), a maritime convention was at issue, the so-called Brussels Convention.[32] That Convention had been amended by a protocol to provide for the use of SDRs, although the protocol was not yet in effect.

These Austrian and Dutch decisions illustrate precisely what is missing in the case at bar: an expression of public policy by the domestic legislature. The Congress has eliminated an official price of gold. The Senate has refused its advice and consent to the Montreal Protocols. No domestic legislation, as exists in other countries, has been proposed here on the conversion question. As long as Article 22 exists in its present form, it is a gold clause. The only price of gold currently in existence is the free-market price. Consequently, if Article 22 is enforceable, it can only be enforced as written based on the free-market price of gold.

POINT II

Alternatively, Article 22 of the Convention should be held to be unenforceable.

It is useful to contrast the present case with the problem before the courts in *Day* v. *Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert.*

[32]Formally known as the Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, *done* Oct. 10, 1957, *reprinted in* 6 *Benedict on Admiralty* 5-11 (7th ed. 1983).

denied, 429 U.S. 890 (1976). There the courts were faced with interpreting the meaning of Article 17, which sets temporal limits on the Convention's applicability. The specific question was whether passengers in a boarding line were within the Convention's coverage. The *Day* case illustrates the typical problem of interpretation faced by the courts in applying general statutory language to concrete situations.

In the present appeal there is no dispute as to the translation or the literal meaning of Article 22. Likewise, no one contends that a limit is to be calculated on the basis of the present-day value of a specific French coin that has not been minted since 1936.

The difficulty is rather one of trying to put into terms comprehensible to the 1980's a system based on the assumptions of the 1920's. The key assumption made by the Convention's drafters concerned the use of gold as a standard of value. Gold has been valuable to man for several thousand years, as it still is today. In 1929, however, that value was set by government fiat. Today, there is still an international price of gold, but the price is set by the market. Because the price of gold now is a market price, it can change frequently based on the perceptions of people throughout the world. Hence, while gold still performs its intended role as a standard of value, the price of gold is now set by a method not expected by the drafters for "a Convention which is drawn for a few years" (minutes, *supra*, at 90; JA162.)

It is also useful to contrast the situation normally faced by the Court in interpreting the Constitution. The system created by the Constitution has continued vitality precisely because a general scheme was outlined and broad language (*e.g.*, "due process of law") was used. The Warsaw Convention, on the other hand, is very specific (see, *e.g.*, Article 8). As a vice-president of the Warsaw Conference noted, "If there are improvements to be brought forth, life does not end today, we can do them later on." (Minutes, *supra*, at 32.)

Unfortunately, the Convention has proven very difficult to amend, and the parties' suggestions are all somewhat Procrustean in their effort to jam 1983 realities into the 1929 framework. As the Second Circuit noted, "Indeed, there are powerful arguments against each of the proffered solutions." 690 F. 2d at 305-6; JA195.

Franklin Mint submits that the only valid alternative to the use of the free-market price of gold is a determination that Article 22 is unenforceable as written. This conclusion was the one reached by the Second Circuit, and is a result supported by both the facts and the applicable American law.

The two key facts are that (1) in 1929 Article 22 was premised on the existence of a price of gold established internationally by government action, and (2) since the Jamaica Accords of 1975 and the U.S. repeal of the Par Value Modification Act, there no longer exists a gold price set by statute.

The legal principles applicable to the foregoing facts are straightforward. The interpretation of a treaty is a judicial question. *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921); see also *Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962); *Society for the Propagation of the Gospel In Foreign Parts* v. *New Haven*, 21 U.S. (8 Wheat.) 464, 491-94 (1823). A treaty is to be regarded as equivalent to an act of the legislature. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 10-11 (1936); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). A treaty stands no higher than any other legislative act. *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

Thus it is clear that a treaty may be modified by a subsequent act of Congress. *Moser* v. *United States*, 341 U.S. 41, 45 (1951). A treaty may be entirely abrogated by a later statute. *Whitney* v. *Robertson*, 124 U.S. 190, 194-95 (1888); *Edye* v. *Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

The Second Circuit's decision is also supported by international law, which is part of our domestic law. *The Paquete Habana,* 175 U.S. 677 (1900). Under the doctrine of *rebus sic stantibus,* a treaty need not be followed when there has been a substantial change in conditions since the promulgation of the treaty. Restatement, Second, of the Foreign Relations Law of the United States §153 (1962). In view of the radical changes that have occurred since 1929, this doctrine is certainly applicable to the Warsaw Convention.

An English solicitor's conclusion on the gold franc issue was that "It is my strongly held view that there is no or no wholly satisfactory solution to be found by the courts anywhere; the muddle can only be cleared up by effective international legislation." Martin, *supra,* at 249. The Court of Appeals reached a similar conclusion when it said that "selection of a unit of conversion and the level of value of a limitation on liability is plainly a matter to be negotiated by the parties, as the history of the Convention demonstrates." 690 F.2d at 311; JA208. Both the international community and the Congress explicitly abandoned the asumption concerning gold by which Article 22 of the Convention had been interpreted in this country for over forty years. The conclusion of the Court of Appeals that the subsequent Congressional act modified the Warsaw Convention is consequently a decision that is constitutionally valid.

POINT III

Article 22 should be held unenforceable as of 1 April 1978.

Although the Court of Appeals determined that Article 22 was unenforceable because of Congressional action, the appellate court gave this holding only prospective effect. The jus-

tification for this decision was that the court's "resolution was not clearly foreshadowed" (quoting *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971) and that "[p]arties to transactions covered by the Convention should have time to adjust their affairs to this ruling." 690 F.2d at 312; JA209. The Court should reverse this portion of the Second Circuit's judgment and remand the action to the trial court for a determination of Franklin Mint's damages.

The Court has given prospective effect to its rulings almost exclusively in the context of criminal constitutional rights. See, *e.g.*, *Wainwright* v. *Stone*, 414 U.S. 21 (1973); *Michigan* v. *Payne*, 412 U.S. 47 (1973). For these cases the retrospective application of newly established constitutional rights would have had the potential effect of forcing the retrial, or release of thousands of convicted criminals.

The civil cases on this topic are likewise readily distinguished. For example, in *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), the Court held unconstitutional a statute limiting the franchise concerning local bond issues. The ruling was made prospective in consideration of the "significant hardships" that retroactive application would have "imposed on cities, bondholders, and others connected with municipal utilities," where the time for challenging such election results had lapsed. 395 U.S. at 706.

In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), the Court concluded that the broad grant of jurisdiction to the bankruptcy courts in the Bankruptcy Act of 1978 is unconstitutional; and this holding was made prospective. The practical effect of a contrary result would have been to invalidate all of the cases filed under the Act. As the Court noted, retroactive application "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 102 S.Ct. at 2880.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the Court listed three considerations as properly bearing upon the issue of retroactivity. 404 U.S. at 106-7; see also *Northern Pipeline Co., supra*, 102 S.Ct. at 2880. The Court of Appeals, however, mentions only one factor in its decision.

The first factor mentioned in *Chevron Oil Co.* is that the decision must establish a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed. 404 U.S. at 106. The present case involves a matter of first impression in the United States; there is no American precedent on the subject.

Nevertheless, at least since the 1974 decision of the Greek appellate court in *Zakoupolos* v. *Olympic Airways Corp.*, No. 256/74 (Court of Appeal, 3d Dep't. Athens, Greece, January 10, 1974), the airlines have known of their exposure to increased liability because of the uncertainty surrounding Article 22. In a 1981 article IATA's counsel of record noted "However, in recognition of the controversy over the conversion rate for the Warsaw limitation, from 'gold' francs into United States currency, settlement offers may still exceed $75,000." R. Craft, "Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation," 46 J. Air L. & Com. 895, 898-99 (1981) (footnote omitted). The very purpose of the Montreal Protocols of 1975 was to eliminate this uncertainty concerning the limitation in the Convention. As stated by the district court in *In re Aircrash at Kimpo International Airport Korea on November 18, 1980*, 558 F. Supp. 72, 75 (C.D. Cal. 1983), *interlocutory review denied*, No. 83-8051 (9th Cir. May 10, 1983):

> It is clearly established that the airlines knew that "a rational limit on liability cannot exist" without an internationally agreed upon unit and "the Montreal meeting in 1975 was a recognition by the Warsaw parties that the Convention's unit had been eliminated." Therefore, air-

lines, including Korean, presumptively knew that this "international disarray" would prevent the Convention from shielding them in any rational manner, and they would be expected to protect themselves and obtain additional insurance.

Furthermore, the knowledge of this "international disarray" and the "recognition by the Warsaw parties that the Convention's unit had been eliminated by events," contrary to the holding in *Franklin Mint*, would allow the airlines to see—as early as 1975—that, eventually, a court would refuse to enforce the Convention. Therefore, this Court's decision as to the enforceability of the Convention is applicable to this action.

The second factor mentioned in *Chevron Oil Co.* is whether retrospective operation will further or retard the operation of the holding in question. 404 U.S. at 106-7. If the Court determines that Article 22 is unenforceable, the basis for that decision must rest on the fact that since 1 April 1978 there is no longer a price of gold set by statute. It makes no sense to reach a decision founded on the significance of that date, yet also to hold that only future cases are affected by this change in the controlling facts. Either the state of affairs was different after 1 April 1978, or it was not. If it was different, then the only way to give full effect to the Court's decision is to make a holding on unenforceability effective as of 1 April 1978.

The final factor is whether retroactive application could produce substantial inequitable results in individual cases. 404 U.S. at 107. In *Chevron Oil Co.*, for example, giving retrospective effect to the pertinent holding would have meant that the plaintiff's claim would have been time-barred. In the present case, not giving retrospective effect would mean limiting TWA's admitted liability (JA15) to about 2.5% of Franklin Mint's claimed damages.

A retrospective ruling in favor of claimants under the Con-

vention will not result in the chaos envisioned in either *Northern Pipeline Co.* or the criminal cases, because Article 29 of the Convention establishes a two-year statute of limitations. A retrospective ruling by the Court would therefore, as a practical matter, affect only pending cases and causes of action that have arisen within the last two years. In view of the uncertainty concerning Article 22 since the mid-1970's, there is no reason, either in equity or in logic, why air carriers (or their liability insurers) should reap the benefit of the international disarray.

This Court stated the matter in *United States* v. *Donnelly*, 397 U.S. 286, 294-5 (1970):

> Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. Generally the United States, like other parties, is entitled to adhere to what it believes to be the correct interpretation of a statute, and to reap the benefits of that adherence if it proves to be correct, except where bound to the contrary by a final judgment in a particular case.

If Franklin Mint is correct in Point II of this Brief that Article 22 is unenforceable, then the Court's ruling should be applicable as of 1 April 1978, the date when the statutory relationship between gold and the dollar was abandoned.

CONCLUSION

For all the foregoing reasons the Judgment of the United States Court of Appeals for the Second Circuit should be reversed and the action remanded to the District Court. Upon remand the District Court should determine, and enter judgment for, the actual amount of Franklin Mint's damages. Alternatively, the District Court should enter judgment for Franklin Mint for the lower of two amounts that are to be determined by the District Court: (1) the limit of TWA's liability using the free-market price of gold on the date of the carriage contract's breach, and (2) Franklin Mint's actual damages.

Dated: New York, New York
October 12, 1983

Respectfully submitted,

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APPENDIX

Article 22 of the Warsaw Convention

CONVENTION FOR UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself, the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousands. These sums may be converted into any national currency in round figures.

Par Value Modifiication Act

Pub. L. No. 92-268, § 2, 86 Stat. 116, 117 (1972):

> SEC. 2. The Secretary of the Treasury is hereby authorized and directed to take the steps necessary to establish a new par value of the dollar of $1 equals one thirty-eighth of a fine troy ounce of gold. When established such par value shall be the legal standard for defining the relationship of the dollar to gold for the purpose of issuing gold certificates pursuant to section 14(c) of the Gold Reserve Act of 1934 (31 U.S.C. 405b).

Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first sentence of section 2 of the Par Value Modification Act is amended by striking out the words "one thirty-eighth of a fine troy ounce of gold" and inserting in lieu thereof the following: "0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold".

Bretton Woods Agreements Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660, 2661 (1976):

> SEC. 6. Section 2 of the Par Value Modification Act (31 U.S.C. 449) is hereby repealed.

Designation of Corporate Relationships

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited, filing their brief on the merits in this consolidated proceeding, state that:

1. This is their first amended Designation of Corporate Relationships.

2. Franklin Mint Corporation is a subsidiary of Warner Communications, Inc.

3. Franklin Mint, Limited is a subsidiary of Warner Communications, Inc. (U.K.), which is in turn a subsidiary of Warner Communications, Inc.

4. McGregor, Swire Air Services Limited, presently known as McGregor Sea & Air Services, Ltd., is a subsidiary of Ocean Cory, Ltd., which is in turn a subsidiary of Ocean Transport & Trading plc.

5. Affiliates and subsidiaries of Franklin Mint Corporation and Franklin Mint, Limited are:

Atari, Inc.
Atlantic Records
WEA Manufacturing
Warner Bros.
Panavision
DC Comics
Warner Cosmetics
Warner Amex Cable Communication
Elektra/Asylum/Nonesuch Records
Warner Special Products
Warner Bros. Television
Warner Home Video
Mad Magazine
Warner Software, Inc.

Cosmos Soccer
Warner Amex Satellite Entertainment Co.
Malibu Grand Prix
Warner Bros. Records
WEA International
Warner Bros. Music Publishing
Licencing Corp. of America
Warner Books
Warner Publisher Services
Warner Theatre Prods.

6. Affiliates and subsidiaries of McGregor, Swire Air Services Limited are:

McGregor Uyeno K.K.
Calayan Co., Ltd.
McGregor Swire Air Services (Malaysia) Sdn. Bhd.
G.E. Green & Co. Pty., Ltd.
MSAS SRL
Society Francaise Wm. Cory et Fils
MSAS Transport GmbH